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                                        The Honorable Jamal N. Whitehead

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DATANET LLC,

                    Plaintiff,

        v.

MICROSOFT CORPORATION

                    Defendant.

Case No. 2:22-cv-1545.

AGREEMENT REGARDING DISCOVERY OF ELECTRONICALLY STORED INFORMATION AND ORDER

15   The parties hereby stipulate to the following provisions regarding the discovery of

16 electronically stored information ("ESI") in this matter:

17 **A.   General Principles**

18   1.   An attorney's zealous representation of a client is not compromised by conducting

19 discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate

20 in facilitating and reasonably limiting discovery requests and responses raises litigation costs and

21 contributes to the risk of sanctions.

22   2.   As provided in LCR 26(f), the proportionality standard set forth in Fed. R. Civ. P.

23 26(b)(1) must be applied in each case when formulating a discovery plan. To further the

24 application of the proportionality standard in discovery, requests for production of ESI and related

25 responses should be reasonably targeted, clear, and as specific as possible. This agreement is

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1 intended to assist the parties in identifying relevant, responsive information that has been stored

2 electronically and is proportional to the needs of the case. The agreement does not supplant the

3 parties' obligations to comply with Fed. R. Civ. P. 34.

4   3.   This ESI agreement shall not govern the production of source code. Requested

5 source code shall be made available by the Producing Party as provided for in the parties'

6 protective order.

7 **B.   ESI Disclosures**

8   Within 30 days of entry of this Order, or at a later time if agreed to by the parties, each

9 party shall disclose:

10   1.   Custodial Data Sources.

11   The parties shall identify the eight (8) custodians most likely to have discoverable ESI in

12 their possession, custody, or control. The custodians shall be identified by name, title, connection

13 to the instant litigation, and the type of information under the custodian's control. If circumstances

14 or discovery so merit, the parties either agree or seek Court intervention to add additional

15 custodians.

16   2.   Non-Custodial Data Sources. A list of non-custodial data sources (*e.g.*, shared

17 drives, servers), if any, likely to contain discoverable ESI.

18   3.   Third-Party Data Sources. A list of third-party data sources, if any, likely to contain

19 discoverable ESI (*e.g.*, third-party email providers, mobile device providers, cloud storage) and,

20 for each such source, the extent to which a party is (or is not) able to preserve information stored

21 in the third-party data source.

22   4.   Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI

23 (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the

24 data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B).

25   5.   Search Terms. For purposes of this Agreement, a "Search Term" may consist of a

26 single word or phrase, or variants of a single word or phrase (such as those that have alternate

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1 suffixes or prefixes but relate to the same root or different spellings of the same word), and may

2 be accompanied by terms intended to limit the search results via narrowing criteria (such as "AND"

3 or "W/X"). Individual words or phrases separated only by a disjunctive term that broadens the

4 search (such as "OR") will be considered separate Search Terms unless (1) the words or phrases

5 are variants of each other or (2) the words or phrases are joined by other limiting terms, such as

6 term1 and (term2 or term3). The producing party may identify each search term or query returning

7 overbroad results, demonstrate the overbroad results, and offer a counter proposal correcting the

8 overbroad search or query.

9   6.   Foreign Data Privacy Laws. Nothing in this Order is intended to prevent either

10 party from complying with the requirements of a foreign country's data privacy laws, *e.g.*, the

11 European Union's General Data Protection Regulation (GDPR) (EU) 2016/679. The parties agree

12 to meet and confer before including custodians or data sources subject to such laws in any ESI or

13 other discovery request.

14 **C.   ESI Discovery Procedures**

15   1.   On-Site Inspection of Electronic Media. Such an inspection shall not be required

16 absent a demonstration by the requesting party of specific need and good cause or by agreement

17 of the parties.

18   2.   Search Methodology. The parties shall timely confer to attempt to reach agreement

19 on appropriate Search Terms, file type and date restrictions, data sources (including custodians),

20 and other appropriate computer- or technology-aided methodologies, before any such effort is

21 undertaken. The parties shall continue to cooperate in revising the appropriateness of the search

22 methodology.

23   a.   Prior to running searches:

24   i.   The producing party shall disclose the data sources (including

25 custodians), search terms and queries, any file type and date restrictions, and any other

26 methodology that it proposes to use to locate ESI likely to contain responsive and discoverable

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1   information.

2   ii.   Within fourteen (14) days of the producing party's disclosure, and

3   consistent with each party's duty to perform a reasonable search for information responsive to

4   discovery requests, the producing party will first provide a good faith list of no less than ten (10)

5   Search Terms to be run across Custodial and Non-Custodial data.   There will be no

6   "individualized" Search Terms on a custodian-by-custodian basis unless agreed to by both sides.

7   In other words, Datanet will prepare one set of Search Terms for all of the Datanet custodians and

8   vice versa for Microsoft.   The producing party may provide unique hit counts for each search

9   query.

10   Within seven (7) days of receiving the producing party's proposed Search

11   Terms, the receiving party may propose additional Search Terms to be run across all of the

12   producing party's Custodial and Non-Custodial data.   The total of the producing party's Search

13   Terms and the receiving party's Search Terms shall not exceed 50 total Search Terms.   There will

14   be no "individualized" search requests on a custodian-by-custodian basis unless agreed to by both

15   sides.

16   iii.   Within seven (7) days of receiving the receiving party's Search

17   Terms, the parties will engage in a meet and confer process to resolve any disputes.   If the

18   dispute(s) are not resolved within seven (7) days of the first meet and confer, the parties will submit

19   the disputes to the Court for resolution.

20   3.   Format.

21   a.   ESI will be produced to the requesting party with searchable text, in a

22   format to be decided between the parties.   Acceptable formats include, but are not limited to, native

23   files, multi-page TIFFs (with a companion OCR or extracted text file), single-page TIFFs (only

24   with load files for e-discovery software that includes metadata fields identifying natural document

25   breaks and also includes companion OCR and/or extracted text files), and searchable PDF.

26   b.   Unless otherwise agreed to by the parties, files that are not easily converted

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1   to image format, such as spreadsheet, database, and drawing files, will be produced in native

2   format.

3   c.   Each document image file shall be named with a unique number (Bates

4   Number). File names should not be more than twenty characters long or contain spaces. When a

5   text-searchable image file is produced, the producing party must preserve the integrity of the

6   underlying ESI, *i.e.*, the original formatting, the metadata (as noted below) and, where applicable,

7   the revision history.

8   d.   If a document is more than one page, the unitization of the document and

9   any attachments and/or affixed notes shall be maintained as they existed in the original document.

10   e.   The full text of each electronic document shall be extracted ("Extracted

11 Text") and produced in a text file unless the document is redacted, in which case, Optical Character

12 Recognition text for the redacted image will be provided. The Extracted Text shall be provided in

13 searchable ASCII text format (or Unicode text format if the text is in a foreign language) and shall

14 be named with a unique Bates Number (*e.g.*, the unique Bates Number of the first page of the

15 corresponding production version of the document followed by its file extension).

16   4.   De-Duplication.   The parties may de-duplicate their ESI production across

17 custodial and non-custodial data sources after disclosure to the requesting party, and the duplicate

18 custodian information removed during the de-duplication process tracked in a duplicate/other

19 custodian field in the database load file.

20   5.   Email Threading. The parties may use analytics technology to identify email

21 threads and need only produce the unique most inclusive copy and related family members and

22 may exclude lesser inclusive copies. Upon reasonable request, the producing party will produce a

23 less inclusive copy.

24   6.   Metadata Fields. If the requesting party seeks metadata, the parties agree that only

25 the following metadata fields need be produced, and only to the extent it is reasonably accessible

26 and non-privileged: document type; custodian and duplicate custodians (or storage location if no

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1   custodian); author/from; recipient/to, cc and bcc; title/subject; email subject; file name; file size;

2   file extension; original file path; date and time created, sent, modified and/or received; and hash

3   value. The list of metadata type is intended to be flexible and may be changed by agreement of

4   the parties, particularly in light of advances and changes in technology, vendor, and business

5   practices.

6   7.   <u>Hard-Copy Documents</u>. If the parties elect to produce hard-copy documents in an

7   electronic format, the production of hard-copy documents will include a cross-reference file that

8   indicates document breaks and sets forth the custodian or custodian/location associated with each

9   produced document. Hard-copy documents will be scanned using Optical Character Recognition

10 technology and searchable ASCII text files will be produced (or Unicode text format if the text is

11 in a foreign language), unless the producing party can show that the cost would outweigh the

12 usefulness of scanning (for example, when the condition of the paper is not conducive to scanning

13 and will not result in accurate or reasonably useable/searchable ESI). Each file will be named with

14 a unique Bates Number (*e.g.*, the unique Bates Number of the first page of the corresponding

15 production version of the document followed by its file extension).

16   <u>Clawback Protections</u>. Pursuant to Fed. R. Evid. 502(d), the production of any

17 documents, electronically stored information (ESI), or information, whether inadvertent or

18 otherwise, in this proceeding shall not, for the purposes of this proceeding or any other federal or

19 state proceeding, constitute a waiver by the producing party of any privilege applicable to those

20 documents, including the attorney-client privilege, attorney work-product protection, or any other

21 privilege or protection recognized by law.

22   Nothing contained herein is intended to or shall serve to limit a party's right to

23 conduct a review of documents, ESI or information (including metadata) for relevance,

24 responsiveness and/or segregation of privileged and/or protected information before production.

25 At the same time, a party shall not be obligated to conduct a document-by-document review of

26 documents prior to its production; provided however, that a party shall utilize keyword search

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1   terms (*e.g.*, the names of counsel and law firms for the producing party, although the failure to

2   identify a particular counsel or law firm as a keyword term shall not be construed as waiver),

3   analytical software tools and/or other reasonable means to locate and exclude potentially

4   privileged materials prior to the production.

5   This Order shall be interpreted to provide the maximum protection allowed by Fed.

6   R. Evid. 502(d). The provisions of Fed. R. Evid. 502(b) do not apply. Should a party choose not

7   to conduct a document-by-document review, the party shall disclose this at the time of production

8   by designating the production volume or Bates ranges and by affixing an appropriate legend to

9   indicate the documents are being produced without review and subject to a Rule 502(d) Clawback

10 ("Subject to Potential Clawback Material"). Such documents produced without review shall be

11 deemed Highly Confidential – Attorneys' Eyes Only. Consistent with the Clawback provisions

12 herein, disclosure of privileged information without review in this Litigation shall in no way

13 prejudice or otherwise constitute a waiver of, or estoppel as to, any attorney-client, work product

14 or other applicable privilege or immunity in this case or in any other federal or state proceeding.

15 Any privileged material produced pursuant to this paragraph shall be deemed to have been

16 produced without waiver under Rule 502(d).

17 **D.   Preservation of ESI**

18   The parties acknowledge that they have a common law obligation, as expressed in Fed. R.

19 Civ. P. 37(e), to take reasonable and proportional steps to preserve discoverable information in the

20 party's possession, custody, or control. With respect to preservation of ESI, the parties agree as

21 follows:

22   1.   Absent a showing of good cause by the requesting party, the parties shall not be

23 required to modify the procedures used by them in the ordinary course of business to back-up and

24 archive data; provided, however, that the parties shall preserve all discoverable ESI in their

25 possession, custody, or control.

26   2.   The parties will supplement their disclosures in accordance with Fed. R. Civ. P.

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1 26(e) with discoverable ESI responsive to a particular discovery request or mandatory disclosure

2 where that data is created after a disclosure or response is made (unless excluded under Sections

3 (D)(3) or (E)(1)-(2)).

4   3.   Absent a showing of good cause by the requesting party, the following categories

5 of ESI need not be preserved:

6   a.   Deleted, slack, fragmented, or other data only accessible by forensics.

7   b.   Random access memory (RAM), temporary files, or other ephemeral data

8   that are difficult to preserve without disabling the operating system.

9   c.   On-line access data such as temporary internet files, history, cache, cookies, and the like.

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11   d.   Data in metadata fields that are frequently updated automatically, such as last-opened dates (see also Section (E)(5)).

12   e.   Back-up data that are duplicative of data that are more accessible elsewhere.

13   f.   Server, system or network logs.

14   g.   Data remaining from systems no longer in use that is unintelligible on the systems in use.

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16   h.   Electronic data (*e.g.*, email, calendars, contact data, and notes) sent to or

17   from mobile devices (*e.g.*, iPhone, iPad, Android devices), provided that a copy of all such electronic data is automatically saved in real time elsewhere (such as on a server, laptop, desktop computer, or "cloud" storage).

18

19 **E.**   **Privilege Logs**

20   1.   A producing party shall create a privilege log of all documents fully withheld from

21 production on the basis of a privilege or protection, unless otherwise agreed or excepted by this

22 Agreement and Order.   Privilege logs shall include a unique identification number for each

23 document and the basis for the claim (attorney-client privileged or work-product protection). For

24 ESI, the privilege log may be generated using available metadata, including author/recipient or

25 to/from/cc/bcc names; the subject matter or title; and date created. Should the available metadata

26 provide insufficient information for the purpose of evaluating the privilege claim asserted, the

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1   producing party shall include such additional information as required by the Federal Rules of Civil

2   Procedure. Privilege logs will be produced to all other parties no later than 30 days before the

3   deadline for filing motions related to discovery unless an earlier deadline is agreed to by the parties.

4   2.   Redactions need not be logged so long as the basis for the redaction is clear on the

5   redacted document.

6   3.   With respect to privileged or work-product information generated after the filing of

7   the complaint, parties are not required to include any such information in privilege logs.

8   4.   Activities undertaken in compliance with the duty to preserve information are

9   protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

10   Dated: September 1, 2023.

11   BYRNES KELLER CROMWELL LLP   MORGAN, LEWIS & BOCKIUS LLP

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ORDER

Based on the foregoing, IT IS SO ORDERED.

DATED: September 13, 2023.

_____
Jamal N. Whitehead
United States District Judge

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